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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 930

GUY ELLENBURG,
Petitioner,

v.

A. L. SHEPHERD, KENNETH R. ROLLINS,
BOBBY GENE WELLS, and MARCUS HIGGINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Guy Ellenburg, the plaintiff-appellant below, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered October 25, 1968, affirming a judgment of the United States District Court for the Eastern District of Tennessee, Northeastern Division, in favor of the respondent, A. L. Shepherd, and dismissing the appeal as to the other respondents.

OPINIONS BELOW

No opinion was filed or reported by the Court of Appeals. The interlocutory opinions of the District Court were not reported and no opinion was filed in connection with the final judgment. The judgment appealed from appears as Appendix B to this petition.

JURISDICTION

(i) The order of the Court of Appeals was filed October 25, 1968.

(ii) A timely petition for rehearing was denied by order entered November 22, 1968, and an order staying the mandate for 30 days was entered December 6, 1968.

(iii) This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the defense of good faith is available to police officers in a civil rights action complaining that they had conducted and conspired to conduct illegal searches under invalid warrants for allegedly obscene literature without a prior adjudication that publications sought were obscene, that they had made wholesale seizures of publications not included in the commands of the warrants, that they had closed the plaintiff's legitimate restaurant at lunch time and excluded his customers while they were making one of the searches, and that they subsequently destroyed the literature without any order of any court to do so, all in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the defense of good faith is available to police officers on a jury trial of a civil rights action where no such defense had been pleaded and no such issue had been included in the pre-trial order.

3. Whether the defense of good faith is available to police officers in a civil rights action where the complaint alleges that the actions of the officers in searching for and seizing literature, as set out in Question 1 were a part of a campaign of harassment designed to force the plaintiff to cease selling what Chief Shepherd called "the type of books that people didn't want their children to have" [see Tr. 203].

4. Whether the defense of good faith, if available at all under the foregoing circumstances, may properly be presented by showing the jury allegedly obscene literature that was never connected to the plaintiff's place of business except by hearsay, including multiple and anonymous hearsay?

5. Whether the Court of Appeals denied the plaintiff his right of appellate review arbitrarily and capriciously by refusing to rule on the meritorious questions presented and by failing to assign any reasons for its decision, where the questions presented to the Court of Appeals included the issues presented in questions 1 through 4 above and also proper challenges to the trial court's actions in (a) denying the plaintiff's uncontested motion to add the defendants' alleged co-conspirators as party defendants; (b) refusing to compel the defendants on discovery to disclose the names of the sources of the complaints about the plaintiff's literature on which the defendants relied for justification of their harassment of the plaintiff; (c) compelling the plaintiff without a prior showing of good cause to disclose who paid his attorney's fees in a state criminal

case and details of his attorney's efforts to obtain rebuttal evidence already known to the defendants; (d) making a series of other pre-trial rulings redrafting the parties' pleadings, confusing the issues, and making trial preparation so burdensome on the plaintiff's out-of-town attorney that he found it necessary to withdraw; and (e) taking from the jury all questions as to the defendants, Rollins, Wells and Higgins, and the questions of conspiracy and punitive damages as to the defendant, Shepherd.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

The foregoing questions primarily involve consideration of the First, Fourth, Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States; the Civil Rights Acts, R.S. §§ 722, 1979, 1980(3) and 1981, and 28 U.S.C. § 1291.

These are set out in Appendix A hereto, pursuant to Rule 23(1)(d), along with the following additional provisions of statutes and ordinances to which the court may also have occasion to refer: Tennessee Code Annotated, former § 39-3001 (1956 edition, Vol. 7, p. 228, as amended prior to its repeal by Tennessee Public Acts of 1965, ch. 92, § 5); Ordinance No. 753 of the Board of Mayor and Aldermen of the Town of Greeneville, Tennessee, passed May 1, 1956.

STATEMENT OF THE CASE

This is a Civil Rights case filed under R.S. §§ 722, 1979, 1980(3) and 1981 of which the trial court had jurisdiction pursuant to those sections and 28 U.S.C. §§ 1331 and 1343.

The complaint alleged a pre-1959 conspiracy by the respondent police officers of Greeneville, Tennessee, later joined by other agents of the State of Tennessee and continuing to and after 1964, to force the plaintiff to cease handling literature they considered objectionable. It further alleged, in chronological order, numerous overt acts, including illegal arrests, illegal searches and seizures, malicious and abortive prosecutions, abuses of process, and conversions of his property, climaxing with a one-hour seizure of his entire restaurant and newsstand and wholesale seizure and destruction of literature that had never been adjudicated obscene or contraband before their seizure nor validly so adjudicated after their seizure. The relief sought was compensatory and punitive damages.

The historical facts set out in the complaint were never in serious dispute apart from the amount of damages and matters necessarily subject to inference, such as malice, conspiracy and intent. And as it turned out, the main issue litigated before the jury was the defense of "good faith," which had not even been pleaded or otherwise raised on the record before trial.

The "good faith" defense was raised before the jury in the opening statement of defense counsel of which the following is the essential part:

> "We will prove everything they [the defendants] did was not only done for probable cause, ladies and gentlemen of the jury but done in good faith. And after you

see the literature, some of the filthy material that forms the basis for this action of the police officers, and Mr. Ellenburg's conviction,[1] I think you will agree with the contention of the defendants that they did, indeed, act in good faith and with probable cause, and that they had in mind the statutes of the state which were at that time constitutional; and the Ordinance of Greeneville, which was at that time constitutional, which prohibited the sale of filthy and obscene material.

"I think you will also have in the back of your mind the fact that this material, which we will prove was in open display in Mr. Ellenburg's place of business, made available not only to the general public, but particularly to youngsters, young children, certainly formed the basis of not only the legal search, but also a subsequent prosecution" [Tr. 38-39].[2]

The "proof" offered in support of that theory of the case consisted entirely of (1) magazines that were never shown to have been obtained by any sworn witness from the plaintiff's place of business [Tr. 205, 213, 221-23]; (2) the officers' testimony about "complaints" from anonymous citizens [*e. g.*, Tr. 202, 220]; (3) the officers' assertions that they believed the magazines brought to them by the complainers and those seized in the raids were "obscene" [*e.g.*, Tr. 285] despite their own attorney's advice to the contrary as early as 1959 [Tr. 217]; and (4) the officers'

---

[1]The plaintiff was convicted of violating T.C.A. § 39-3001, but the conviction was set aside on appeal because the statute did not require scienter. **Ellenburg v. State**, 215 Tenn. 153 (1964).

[2]Bracketed references designated "Tr." refer to pages of the transcript of trial proceedings.

assertions that they believed the statute and ordinance relating to obscene literature were valid [Tr. 233-234] although there was *no* evidence they had more than the vaguest notion what the statute and ordinance provided and there was strong evidence that they paid no attention to the specific provisions of the legislation [see Tr. 291].

This defense was the finale of the trial, but it was directly related to the first exception preserved by the plaintiff in pre-trial discovery—the trial Court's refusal to require the defendants to disclose the identity of the anonymous informers on whom they had allegedly relied in obtaining search warrants in the state courts, on whom they relied in attempting to show probable cause on their motion for summary judgment, and on whom they were to rely on the trial in an attempt to show good faith.

The plaintiff's trial counsel repeatedly objected to the injection of the issue on the trial, to the admissibility of evidence offered in presentation of this issue and to the inflammatory manner in which defense counsel pursued this defense and some of the objections were sustained, others sustained temporarily [Tr. 49, 68, 69, 73, 74, 75, 79, 80, 93, 94, 204, 205-09, 220, 221, 222, 230]. They also submitted an appropriate request for instructions on the point, which was denied [Tr. 347-48].

Other pre-trial and trial rulings to which the plaintiff reserved exceptions arose as follows:

Beginning in January, 1967, the defendants' counsel obtained a series of orders from the court directing the plaintiff to answer questions relating to his counsel's investigation of collateral matters injected into the case by the defendants' own affidavits about their own backgrounds. Without detailing each step, this series culminated in an order holding that "The defendants are entitled

to a disclosure by the plaintiff of the names, identities and whereabouts of any persons having knowledge of facts pertaining to the occurrences out of which this action arose," and ordered the plaintiff to submit to further examination accordingly. Upon resumption of the deposition, the defendant's counsel refused to ask a single question limited to "persons having knowledge of facts pertaining to the occurrences out of which this action arose," and the plaintiff, on advice of counsel, declined to answer the intentionally broader questions defense counsel did ask. This resulted in a final order May 12, 1967, directing the plaintiff to disclose the name of a private investigator hired by the plaintiff's counsel to investigate facts other than those "pertaining to the occurrences out of which this action arose," and assessing the plaintiff's attorney $100 for giving the good faith advice.

Meanwhile, on January 24, 1967, the plaintiff filed a written motion for leave to amend and supplement his complaint to bring in additional defendants, including the persons named as co-conspirators in the original federal complaint. The motion recited technical difficulties in parallel proceedings in the State courts which had led to the filing of the original federal complaint and additional technical difficulties developing thereafter that also made the state remedy ineffective as against the other alleged conspirators against whom the state action was still pending. The motion clearly indicated the plaintiff's intention of dropping the state proceedings. The motion was not opposed by brief or otherwise. The Court nevertheless denied the motion on grounds of former suit pending. Since all authority of which counsel then had (or now has) knowledge held that a plea of former suit pending was unavailable in federal court on the basis of a suit pending in a state court, counsel had reasonably anticipated the motion would be promptly granted requiring pre-trial pro-

ceedings to be suspended pending joinder of issue by the new defendants. However, as the time for a scheduled pre-trial conference neared, he filed a motion for postponement of the conference for these reasons. To his surprise both motions were denied without hearing on the afternoon before the pre-trial conference was scheduled—March 1, 1967.

As a result of the pre-trial conference, a lengthy pre-trial order was entered, completely recasting the case, eliminating the carefully drawn pleadings of the parties, and setting up a difficult schedule for out-of-town counsel to follow in completing trial preparation. All parties entered lengthy exceptions to this order and it was amended by the court without any further conference with counsel, and without any hearing on the exceptions.

Thereafter, present counsel concluded he could not effectively represent the plaintiff in the trial court. He withdrew by leave of court, and was replaced by other counsel.

On the trial, before the plaintiff's proof had been completed, the court of its own motion raised the question of whether there was sufficient evidence of conspiracy and the resulting colloquy closed like this:

> "MR. TORBETT: In W. E. Hopton's deposition, he states that the raid in Greeneville was under his authorization. Later on he denies this, but in his testimony in the Gateway case, which will be admitted, he testified that the raid in Greeneville was under his direction.
>
> "THE COURT: Well, didn't he have the right to make a raid in Greeneville?

"MR. TORBETT: If your Honor please, we don't dispute his right to make the raid, but in linking them all together, the three of them together, to make this raid.

"Whether they should or shouldn't make the raid—

"THE COURT: What three?

"MR. TORBETT: Hopton, Bauer and Shepherd.

"THE COURT: Bauer was working for Hopton, wasn't he?

"MR. TORBETT: That's right.

"THE COURT: And he had to do what Hopton told him theoretically, did he not?

"MR. TORBETT: Theoretically, he did.

"THE COURT: And these other defendants here, the local police officers, they were under Chief Shepherd's direction, were they not?

"MR. TORBETT: As to the other police officers, we don't have any evidence of conspiracy.

"THE COURT: Should the matter be dismissed as to them now?

"MR. TORBETT: I think so. It might as well be dismissed now as to them.

"THE COURT: All right, let the matter be dismissed as to all defendants except the defendant Shepherd" [Tr. 150-151].

Although it was undisputed that the three officers participated in the searches and seizures, this dismissal was not limited to the conspiracy.

At the close of the plaintiff's proof, the court granted a motion for a directed verdict in part and overruled it in part as to the remaining defendant as follows:

> "THE COURT: Well, the Court believes, as stated previously, that there is not sufficient evidence of any conspiracy formed in part by the defendant Shepherd, or joined by him to warrant submitting the case to the jury under Section 1985.
>
> "The Court also believes that there is not sufficient evidence to submit to the jury the question of any neglect on the part of Chief Shepherd to prevent anyone else depriving the plaintiff of his federally guaranteed rights under color of state law.
>
> "As to those two matters, the motion of the defendant is hereby granted. And as to the deprivation of federally guaranteed rights under color of state law, Sec. 1983, the motion will be overruled." [Tr. 199]

Later, in the course of colloquy with counsel, the court announced on its own motion that it would not charge the jury on punitive damages [Tr. 304]. He then granted a formal motion to include punitive damages in the defendants' motion for a directed verdict [Tr. 305].

The jury returned a verdict for the defendant [Tr. 344]. Judgment was entered thereon on August 16, 1967.

The plaintiff then retained his original counsel again to prosecute an appeal. After the notice of appeal and bond had been filed he discovered that the judgment appealed from had been entered in favor only of the defendant Shepherd and that the dismissal as to the other defendants had

been entered on the minutes August 21, 1967. He thereupon moved the Court of Appeals in the alternative to amend the Notice of Appeal specifically to include all defendants or to remand the case for entry of an appealable order as to all defendants. The motion was not opposed. The Court of Appeals granted the motion to amend. Some time later, the defendants' counsel moved to dismiss the appeal as to the additional defendants on grounds the case had been dismissed on the plaintiff's motion as to them. This motion was granted, but on petition to rehear, the order dismissing the appeal was vacated.

After oral argument October 11, 1968, the Court of Appeals entered an order October 25, 1968, dismissing the appeals as to Rollins, Wells and Higgins and affirming the judgment of the District Court as to Shepherd, all without assigning reasons or citing authority.

On November 22, 1968, the Court of Appeals entered a further order denying a petition for rehearing without assigning reasons or citing authority.

ARGUMENT

A. Scope of "Good Faith" Defense

Few cases could come to this court that would illustrate so dramatically as this one the pressing need for an early delineation by this court of the proper scope of the "good faith" defense made applicable to Civil Rights Act cases by *Pierson v. Ray*, 386 U.S. 547 (1967).

On its facts, the *Pierson* case appears to apply only to a good faith belief in the validity of a statute that was declared unconstitutional after the officer had made an otherwise valid arrest for violation of the statute.

So interpreted, the *Pierson* rule could hardly have had much effect on the present case, in which all reference to the validity of any statute or ordinance could be deleted without affecting the main thrust of the plaintiff's theory.

The statute and ordinance the police officers claimed they relied upon in good faith nowhere authorized the "enforcement" procedures adopted by the defendants and their alleged co-conspirators.

Here, the petitioner earnestly contends that the *admitted facts* show a high-handed disregard of virtually every case on search for and seizure of literature from *Entick v. Carrington*, 19 How. St. Trials 1029 (1765) through *Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961).

How could any officer join in a wholesale seizure of literature, more than a year after *Marcus* (and its reaffirmation of *Entick*), and claim he acted in good faith under a warrant based on the bare *opinion* of the affiant that certain publications were obscene.

How could any officer set out to force dealers to quit selling "the type of books that people didn't want their children to have," and claim he acted in good faith more than two years after *Butler v. Michigan*, 352 U.S. 380 (1957), declared that a state may not "reduce the adult population . . . to reading only what is fit for children"?

In connection with the 1959 and 1960 raids, of course, the defendants could not be held to knowledge of the specific holdings of *Marcus*, *supra*, or of *Mapp v. Ohio*, 367 U.S. 643 (1961), decided the same day.

But those cases merely applied settled principles to specific situations and remedies. *Marcus* added nothing but emphasis and detail to the principles long established in *Entick*, *supra*; *Boyd v. United States*, 116 U.S. 616

(1886); and *Near v. Minnesota ex rel Olsen*, 283 U.S. 697 (1931). And *Mapp* overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), only with respect to the requirement of exclusion of evidence obtained in violation of the Fourteenth Amendment.

Furthermore, *Alberts v. California*, 354 U.S. 476 (1957); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Butler v. Michigan*, *supra*, were two years old at the time of the 1959 raid and had been specifically explained to the defendants a year before the 1960 raid without any apparent deterrent effect [Tr. 41].

If these officers, who were sworn to uphold the law, could claim good faith ignorance of established federal law affecting their everyday operations, where can the defense be limited short of complete emasculation of the Civil Rights Act?

That question alone, surely, is sufficient to demand this court's immediate attention not only as an important question of federal substantive law under the Civil Rights Act, but also as a matter of importance to the administration of justice.

If it be assumed that the good faith defense might apply across the board in Civil Rights cases without destroying the Act, whatever might be left to a plaintiff would still be useless under the rules of pleading and evidence applied to the defense in this case.

Rule 8(c), Federal Rules of Civil Procedure, provides in pertinent part that, "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction . . . , and any other matter constituting an avoidance or affirmative defense." Here the pleadings and other parts of the pre-trial record contain no reference whatever to the defense of good faith,

although *Pierson v. Ray*, *supra*, was decided in adequate time (April 11, 1967) for the defendants to have moved to amend the pleadings or the pre-trial order to include the defense.

Even if the issue be assumed to have been properly raised, still something more would have been required as a matter of law than a bare assertion of intentions jurors might consider good in a certain time and place.

Otherwise, jurors would be authorized to equate good faith with good intentions, as defense counsel blatantly asked the jury in this case to do.

Where, as here, the case involves a campaign against matter that even those who surreptitiously enjoy it understand to be generally considered bad in the community, a fair trial of the legal issues would become virtually impossible.

Where the claim of good intentions to stamp out evil is further enhanced by suspension of ordinary rules of evidence to allow the allegedly evil matter to be waved under the jurors' noses in an inflammatory matter, the trial becomes a total farce.

And that's just what happened in this case.

It follows that it is crucial to the continued efficacy of the congressional choice of means of enforcing the Fourteenth Amendment that this court quickly determine whether the Court of Appeals correctly decided the first four questions presented.

B. Scope of Appellate Review

The Court of Appeals did not see fit to give the reasons for its affirmance of the trial court's actions either with respect to the four questions already discussed or any of the other questions presented on the appeal.

Canon 19 of the Canons of Judicial Ethics of the American Bar Association provides, in pertinent part:

> "In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law."

If this canon represents sound principles, it must be assumed that the respected Court of Appeals below considered the questions presented by the appellant to have been frivolous.

But it is respectfully submitted that even if that be the reason the Court of Appeals declined to rule upon or even discuss any of the questions presented, the same principles should have resulted at least in some indication of the basis for so considering them.

Counsel respectfully submits that little short of square authority in direct point substantively and procedurally by a controlling court of last resort on the same question can render further litigation of a question legally frivolous.

In the present case, *Pierson v. Ray*, *supra*, was the strongest authority cited against the petitioner at any stage of the proceedings in either of the courts below on any

question.[3] And, as indicated by the discussion under Part A of this argument, that case falls far short of disposing of all the questions arising upon the trial court's treatment of the defense of "good faith" in the present case.

At the other end of the scale was the question of the trial court's action in denying the plaintiff's motion to amend his pleading to add the defendants' alleged co-conspirators as parties defendant on grounds a former suit was pending in a state court.

All of the authority plaintiff's counsel has been able to find supports the undeviating rule that the pendency of a suit in a state court will not be grounds for abating a subsequent action in a federal court between the same parties on the same cause of action, and vice versa. *Donovan v. Dallas*, 377 U.S. 408, 412 (1964); *McNeese v. Board of Education*, 373 U.S. 668, 673, n. 5 (1963); *Kline v. Burke Construction Co.*, 260 U.S. 226, 230 (1922); *Brown v. Duffin*, 13 F. 2d 708 (6th Cir. 1926); *United States v. Taylor's Oak Ridge Corp.*, 89 F. Supp. 28 (1950); *Hubbs v. Nichols*, 201 Tenn. 304 (1957); 1 *C.J.S.*, *Abatement and Revival* §67, pp. 101-104; 1 *Am. Jur.* 2d, *Abatement, Survival & Revival*, §18, p. 58; 1A *Wright, Barron & Holtzoff's Federal Practice & Procedure* §351, pp. 334-35.

Whatever may be said of the trial court's discretion in adding parties generally, it is hardly frivolous to question the exercise of that discretion where the court's reason was contrary to such a well-settled principle of law. This

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[3] Monroe v. Pape, 365 U.S. 167 (1961), was, of course, equally strong authority for the proposition that the municipal corporation was not a person within the meaning of the Civil Rights Act, but that case did not involve the questions of waiver or of the trial court's discretion to raise the point without any objection by any party, which were the points presented with respect to that proposed defendant.

is particularly true in this case, where the result was to defeat the plaintiff's declared purpose in making the motion to *eliminate* dual litigation of the same matters. And it was hardly frivolous to suggest that the plaintiff was prejudiced where it appears that the conspiracy charge was dismissed by the court and the plaintiff's use of the depositions of the alleged co-conspirators was limited on grounds that they were not parties. [*E.g.*, Tr. 143]

It is respectfully submitted that in an appeal of right to an intermediate appellate court, see 28 U.S.C. § 1291, it is an abuse of discretion for the court to refuse to indicate some reason for its disposition of non-frivolous questions, and it so far departs from the usual course of proceedings in such courts as to require the exercise of this court's power of supervision. It further seriously hampers the plaintiff's right to seek review in this court by certiorari.

CONCLUSION

The plaintiff respectfully contends the writ of certiorari should be granted, and the cause reversed for either a new trial in the District Court or a full hearing in the Court of Appeals.

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APPENDIX A

CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

—Amendment I

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

—Amendment IV

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

—Amendment V

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

—Amendment VII

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—Amendment XIV

UNITED STATES STATUTES

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subject, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979

—42 U.S.C. § 1983

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injuried in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980 (3)

—42 U.S.C. § 1985 (3)

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, than for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. R. S. § 1981

—42 U.S.C. § 1986

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified

and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. R. S. § 722

—42 U.S.C. 1988

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

—28 U.S.C. § 1291

TENNESSEE STATUTES AND ORDINANCES

If any person print, publish, import, sell or distribute any book, pamphlet, ballad, or printed paper containing obscene language or obscene prints, pictures, or descriptions, manifestly tending to corrupt the morals, or introduce the same into any family, school, or place of education, or have the same in his possession for the purpose of loan, sale, exhibition, or circulation, or with intent to introduce the same into any family, school, or place of education, he shall be guilty of a misdemeanor.

—39 T.C.A. § 3001

BEING AN ORDINANCE PROHIBITING THE SALE OF IMMORAL AND/OR INDECENT LITERATURE.

BE IT ORDAINED BY THE BOARD OF MAYOR AND ALDERMEN OF THE TOWN OF GREENEVILLE, TENNESSEE, That it be unlawful to sell, offer for sale, give away or distribute literature or pictures in said town which are immoral and/or indecent.

BE IT FURTHER ORDAINED That any literature or picture, the distribution of which thru the United States Mails is prohibited, shall be presumed to be immoral and/or indecent.

BE IT FURTHER ORDAINED That any person, firm or corporation upon conviction for violating this Ordinance shall pay a fine of not less than FIVE DOLLARS ($5.00) nor more than FIFTY DOLLARS ($50.00).

BE IT FURTHER ORDAINED That this Ordinance take effect from and after its passage, the public welfare requiring it.

ORDINANCE NO. 753
Town of Greeneville, Tennessee

APPENDIX B

No. 18,240

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GUY ELLENBURG,
Plaintiff-Appellant,

vs

A. L. SHEPHERD,
KENNETH R. ROLLINGS,
BOBBY GENE WELLS and
MARCUS HIGGINS,
Defendants-Appellees.

FILED
OCT 25 1968
CARL W. REUSS, Clerk

ORDER

Before WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

The motion to dismiss the appeal as to defendants-appellees, Kenneth R. Rollins, Bobby Gene Wells and Marcus Higgins, is granted and the appeal is hereby dismissed as to them.

On consideration of the appeal as to defendant-appellee, A. L. Shepherd, the Court finds that there is substantial evidence to support the verdict of the jury and that no prejudicial error has intervened.

It is accordingly ORDERED that the judgment of the District Court be and it is hereby affirmed.

Entered by order of the Court.

CARL W. REUSS
Clerk

SUPREME COURT, U. S.

JAN 29 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 930.

GUY ELLENBURG,

Petitioner,

v.

A. L. SHEPHERD, KENNETH R. ROLLINS, BOBBY GENE WELLS AND MARCUS HIGGINS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HERBERT R. SILVERS,
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Greeneville, Tennessee,
Attorney for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-8547

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ADDITIONAL STATEMENT.

This is a civil action wherein the plaintiff[1] sought compensatory and punitive damages from four police officer defendants for claimed deprivation of civil rights under the provisions of 42 U.S.C., Sections 1983, 1985(3) and 1986.

The case was tried to a jury in the United States District Court for the Eastern District of Tennessee, Northeastern Division. During the trial, and upon motion of the plaintiff and the concession of plaintiff's attorney that he had no evidence of a conspiracy against the three defendant subordinate police officers, Rollins, Wells and Higgins, the action was dismissed as to them. (Tr. 150, 151.)[2]

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[1] For convenience the parties will be referred to as they were in the Trial Court. That is to say, the petitioner, Guy Ellenburg, will be referred to as the plaintiff and the respondents, A. L. Shepherd, et al., as the defendants.

[2] Citations to the transcript will be made as follows: (Tr. --).

Motion for a directed verdict in favor of the remaining defendant, Greeneville Police Chief A. L. Shepherd, was sustained to the extent of the conspiracy (42 U.S.C. 1985(3)) and neglect (42 U.S.C. 1986) features of the plaintiff's claim and his claim for punitive damages. (Tr. 181, 182, 198, 199, 305.)

The case was submitted to the jury as to the defendant, A. L. Shepherd, under 42 U.S.C. 1983, which found the issues in favor of the defendant and against the plaintiff.

At no stage of the trial did the plaintiff move for a directed verdict.

The plaintiff perfected an appeal against all four defendants to the United States Court of Appeals for the Sixth Circuit, and assigned error with respect to a number of procedural and evidentiary questions. The Court of Appeals, after hearing oral arguments, sustained the motion of the defendants, Rollins, Wells and Higgins, to dismiss the appeal as to them, and entered an order affirming the judgment of the District Court dismissing the case as to the defendant Shepherd.

ARGUMENT.

The petition fails to point out any reason that would cause this Court to take jurisdiction for the purpose of review or to call for the exercise of its power of supervision.

In his Statement of Questions presented and Statement of the Case, the plaintiff is merely repeating the extravagant charges alleged in his complaint and which he was simply unable to prove during the trial of the case below.[3]

Under circumstances where the plaintiff did not move for a directed verdict at any stage of the trial in the District Court, the jury verdict forecloses appellate review of the sufficiency of the evidence with respect to the issues submitted to the jury. The plaintiff points to no evidence (and there was none) that would have entitled him to go to the jury on the issues that were withdrawn from it on defendant's motion for a directed verdict.

Under this posture of the case the petition does not, and cannot, bring forward for review any substantial Federal question, but must be limited to the procedural and evidentiary questions therein raised. The Court of Appeals properly held that the plaintiff wholly failed to establish that prejudicial error had intervened with respect to such questions.

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[3] For example, there is absolutely no proof in the record that the material seized by the defendants was destroyed. As a matter of fact, this material which was introduced by the State during the 1963 criminal trial and which formed the basis for plaintiff's conviction under the State Obscenity Statute (T.C.A. 39-3001) which was later reversed by the Supreme Court of Tennessee upon constitutional grounds and a finding that the Obscenity Statute was unconstitutional, is still in the custody of the Tennessee Supreme Court Clerk in Knoxville, Tennessee.

The Court of Appeals properly granted the defense motion to dismiss the appeal as to the subordinate police officers, Rollins, Wells and Higgins. *Stewart v. Lincoln Douglas Hotel Corp.* (C.A. 7th, 1953), 208 F. 2d 379; *Stanford v. Utley* (C.A. 8th, 1965), 341 F. 2d 265.

CONCLUSION.

The petition wholly fails to establish that the decision of the Court of Appeals is in conflict with the decision of another Circuit, that the question presented is an important question of Federal law which has not been but should be settled by this Court, that the decision of the Court of Appeals is in conflict with applicable decisions of this Court, or that there was, at any stage of the proceedings below, such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.[4]

For these reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

HERBERT R. SILVERS,
First National Bank Building,
Greeneville, Tennessee,
Attorney for the Respondents.

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[4] Rule 19, Rules of the Supreme Court in the United States.